



## To exclude or not to exclude?

**Deciding to exclude a bidder on grounds of discretionary exclusion or for non-compliance is a tricky decision and one which we are frequently asked to advise on. Stephanie Rickard, Partner at VWV, looks at some of the recent cases, including the high profile case of *Stagecoach East Midlands Trains & Ors v The Secretary of State for Transport*, on the approach the court takes to reviewing exclusions and sets out guidance on how to mitigate risk.**

One of the themes in procurement litigation over the last year has been challenges brought in relation to a decision to exclude a bidder from a tender process.

In June, the High Court upheld the decision of the Department for Transport ("DfT") to exclude Stagecoach from bidding for a rail franchise on grounds of non-compliance with the pension requirements. The judgement is over 600 pages long, which gives some indication of the complexities involved.

This case highlights the difficulties faced by contracting authorities. If a bidder is excluded and subsequently challenges the exclusion decision, this creates an unwelcome distraction from running the tender process. Often, clients are also concerned about weakening the competition for those that remain. However, if a contracting authority allows a bidder to continue in the competition and that bidder ultimately becomes the highest scoring bidder, this can provide grounds for challenge from an unsuccessful party.

The two main grounds for exclusion are:

- where a bidder falls within a ground for exclusion under regulation 57 of the Public Contracts Regulations 2015 ("PCR") at selection stage as being unsuitable to bid for public contracts. The cases focus on the discretionary right to exclude under regulation 57 (3) and (4).
- where the bidder fails to achieve a minimum standard or comply with minimum conditions of tendering either at the selection or award stage. For example, bidders may seek to qualify offers by carving out liability under the contract or for costs associated with the transfer of employees, or state they are unable to provide parent company guarantees.

### **The caselaw**

As can be seen from these cases, although they may apply to different sectors, the type of contracts will be ones that universities regularly enter into.

***Vert Marine SAS v Premier Ministre*** dated 11 June 2020 (Case C-472/19).

Vert Marine is a sports and leisure management company who operates concession contracts. It challenged a decision to disqualify it for failure to pay taxes and or social contributions on the basis it had not been given an opportunity to demonstrate how it had taken steps to remedy the breach, the so called "self-cleaning" defence.

The European Court of Justice confirmed that where a discretionary right to exclude applies, the right to exclude should not be applied automatically and bidders must be provided with an opportunity to put their case forward as to why they should not be excluded.

***Consortia Nazionale Servizi Societa Cooperativa ("CNS") v Gruppo Torinese Trasporti*** dated 4 June 2019 (Case C-425/18)

This case concerned a contract for the provision of cleaning services in the transport sector. CNS was the winning bidder. The contracting authority discovered prior to awarding the contract to CNS that CNS has been fined over 56 million euros by the Italian competition authorities for entering into anti-competitive agreements to influence the outcome of another tender process! CNS was excluded on the grounds of grave professional misconduct. The challenge concerned whether breach of competition laws amounted to grave professional misconduct.

The court upheld the exclusion stating that the infringement and subsequent fine went to the professional credibility of the bidder. In particular the bidder was criticised for failing to mention the infringement in its tender submission. It also emphasised the importance of any exclusion decision being based upon its individual facts and for the contracting authority to act proportionately.

***Tim spA - Direzione e coordinamento Vivendi SA v Consip SpA and others*** (Case C-395/18)  
***Delta Antrepriză de Construcții și Montaj 93 SA v Compania Națională de Administrare a Infrastructurii Rutiere SA*** dated 3 October 2019 (Case C-267/18)

These cases involved exclusion of the main contractor, where the issue that gave rise to the exclusion occurred at the sub-contractor level.

The Tim case concerned an IT contract. The contracting authority permitted sub-contracting but subject to approval of the sub-contractors. When carrying out checks on one of the sub-contractors proposed by Tim, the contracting authority found that the sub-contractor was in breach of rules on disabled persons' right to work.

In the Delta case, a consortium was excluded because one of its members was part of another consortium, whose contract with another contracting authority had been terminated because it had subcontracted without authorisation.

In both cases, the exclusion was found to be justified. Where a bidder places heavy reliance on a sub-contractor, it is expected to ensure that the proposed sub-contractor is suitable to perform public contracts.

***Stagecoach East Midlands Trains & Ors v The Secretary of State for Transport*** dated 17 June 2020 (EWHC 1568)

As mentioned earlier, Stagecoach was excluded for failure to comply with a tender requirement regarding liability for pension contributions.

DfT offered the same deal to all bidders - whilst some bidders including Stagecoach proposed alternative offers, other bidders were prepared to accept the requirement. Moreover, the consequences of non-compliance were clearly set out, with bidders being warned of the risk of exclusion. The judge noted that if the DfT had chosen any other route than exclusion, it would have been subject to challenge from other bidders. The judge also seemed to take into account other

issues of non-compliance with the bids and the chances of Stagecoach ultimately winning the bid were unlikely given past bidding performance.

### **Summary of key points**

What can universities take away from these decisions if they are considering the option of excluding a bidder from a tender process:

- you must review all the relevant facts and take an informed decision. You should keep a clear audit trail of the reasons for your decision.
- be proportionate - exclusion should be last resort. Are there other options available such as giving bidders an opportunity to clarify their position or provide alternative solutions?
- if relying upon a ground for exclusion for failure to meet a minimum requirement, check you have clearly stated the pass/fail level and the consequences of failure to meet achieve the standard.
- carry out a sense test to ensure your proposed course of action meet the fairness test to all bidders.

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